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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK KENE LEE,

Defendant and Appellant.

C086770

(Super. Ct. No. 16FE021010)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 2, 2019, be modified as follows:

1. On page 4, the second paragraph under section C, the sentence beginning on the last line (“She told him”) and continuing on page 5 should be deleted and replaced with the following:

She told him she could not because she had to work, but
defendant said that if she did not leave, he would hurt
her or a customer.

2. On page 5, the first paragraph, line four, the sentence that begins with “Defendant responded,” should be deleted and replaced with the following:

Defendant responded that if she did not go with him he would hurt her.

3. On page 5, the first full paragraph, delete the second sentence in its entirety. (He also put the knife in his pocket.)

4. On page 5, the second full paragraph, delete the second sentence in its entirety. (While doing so, he pulled out a second knife from the driver-side door.)

5. On page 5, the second full paragraph, the fourth sentence that begins with “When defendant was not paying attention” should be deleted and replaced with the following:

After a struggle, defendant punched Asia on the left side of her face, making her light headed.

6. On page 6, section II (Trial Proceedings), the first paragraph, the third sentence that begins with “As to the October 29 incident” should be deleted and replaced with the following two sentences, keeping footnote 3 attached to the end of the new second sentence.

As to the October 29 incident, Asia claimed defendant forced her to leave La Bou by brandishing a knife and threatening to stab her or a customer. She also claimed that while driving out of the La Bou parking lot, defendant tried to stab her twice.

There is no change in the judgment. Respondent’s petition for rehearing is denied.

BY THE COURT:

/s/ _____
Robie, Acting P. J.

/s/ _____
Duarte, J.

/s/ _____
Renner, J.

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(Super. Ct. No. 16FE021010)

A jury found defendant Patrick Kene Lee guilty of several domestic violence related crimes occurring on three separate occasions against Asia, the mother of his son, and his son L. As to the first incident, occurring on June 21, 2016,¹ the jury found defendant guilty of inflicting corporal injury resulting in a traumatic condition upon Asia, a misdemeanor. As to the second incident, occurring on October 15, it found him guilty

¹ Further date references are to 2016 unless otherwise indicated.

of inflicting corporal injury resulting in a traumatic injury and threatening to commit a crime that would result in death or great bodily injury upon Asia, as well as personally using a deadly weapon during the commission of these crimes. The jury, however, did not find true that defendant personally inflicted great bodily injury. The jury further found defendant guilty of inflicting unjustifiable physical pain or mental suffering upon L., a misdemeanor, during this incident. As to the third incident, occurring on October 29, the jury found defendant guilty of kidnapping, false imprisonment, and threatening to commit a crime that would result in death or great bodily injury, all upon Asia. It further found defendant inflicted great bodily injury upon Asia during the kidnapping but did not personally use a deadly weapon during that offense or the other offenses occurring on that date. It also acquitted defendant of assault with a deadly weapon.

Defendant appeals contending his conviction for false imprisonment must be reversed because it is a lesser included offense of kidnapping and was predicated upon the same act as the kidnapping. He also contends insufficient evidence supports the jury's finding he inflicted great bodily injury upon Asia during the course of the kidnapping and that he posed a danger to L. during the incident that occurred on October 15. Lastly, he contends the trial court prejudicially erred by admitting Asia's and other witnesses' hearsay statements, in addition to admitting the recordings of Asia's police interviews while she was in the hospital following the October 29 incident.

We agree defendant's conviction for false imprisonment must be vacated but disagree as to his remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Crimes

Defendant and Asia started dating when Asia was 16 years old and defendant 17 years old. Asia became pregnant two years into the relationship when defendant was 19 years old. After L.'s birth in July 2015, the two lived with defendant's family. At the

start of their relationship, everything seemed fine. Then, shortly before Asia became pregnant, defendant became abusive. It started with verbal abuse and then became physical. Often, defendant would break Asia's phone when she tried to report the abuse. The abuse occurred in private but usually resulted in bruising. Besides the three incidents described below, defendant physically abused Asia once on June 15 by punching her on her head, arms, and legs when she did not respond to his calls for her. Around the same time, the two were in an argument in the car and defendant threw a ceramic cup at Asia, which broke when it hit her shin.

A

June 21

On June 21, Asia planned to take L. to Asia's grandmother's house for a visit. Her cousin, sisters, and brother came to pick up her and her son to drive them in Asia's mother's car. While L. was in the car with Asia's brother and sister, and her cousin and other sister were outside the house, defendant and Asia were in their bedroom where defendant took Asia's phone and told her he did not want her to leave until she gave him money. She told him she did not have any money, but defendant did not believe her and told her he knew she was lying. He grabbed her purse off her shoulder and tore it in half before rifling through the contents. Asia's sister responded to the commotion and saw defendant do this. Asia's cousin also responded to her cries for help.

He then pulled Asia's hair hard enough to pull her onto the ground. He dragged her across the floor by her hair and hit her in the face with the metal part of her purse, causing injury. Asia's cousin and sister pulled defendant off Asia. Defendant paced in the hall, and the three went to the car. Defendant said he wanted to say goodbye to L. and went to the car to do so, but instead took the keys out of the ignition to prevent Asia from leaving. Asia found a spare key and the group left.

B

October 15

On October 15, defendant picked up Asia and L. from a family gathering at Asia's grandmother's house. Asia sat with L. in the backseat. After driving away, defendant gave Asia a pair of scissors and told her to cut her hair. Asia refused and defendant angrily told her that if she did not comply he was going to kill both her and L. For the next two hours, defendant drove around and continued to demand Asia cut her hair. L. cried because he was tired and because defendant was yelling. L. also did not like to be in cars for long periods of time and likely cried because of that as well. Defendant yelled at Asia to make L. stop crying. Asia responded that the only thing that would make L. stop would be for defendant to take them home or to stop yelling. Defendant refused to take them home and continued to yell at Asia to make L. stop crying and even threatened to kill both of them if she did not comply.

About an hour into the incident, defendant took out a knife and swung it at Asia with his right hand. The blade of the knife hit her on her knee, causing it to bleed. Asia cried and begged defendant to take them home or to a hospital. Defendant refused and continued driving for another hour demanding Asia cut her hair before eventually taking them home. L. fell asleep at some point during the incident.

C

October 29

Two or three days before October 29, Asia decided to end her relationship with defendant and moved out of his mother's house with L. and in with her father. She did not tell defendant she was leaving or where she went.

On October 29, Asia went to work at La Bou, where she opened that day at 6:00 a.m. Around 10:30 a.m., defendant came into the restaurant asking for her. When Asia did not appear for several minutes, he yelled her name twice. Asia came over to defendant and he demanded she leave with him. She told him she could not because she

had to work, but defendant took out a pocket knife and said that if she did not leave he would hurt her or a customer. Asia took her lunch break and sat with defendant at the front of the restaurant trying to calm him down. Defendant told Asia he wanted to talk with her in the car, but Asia refused. Defendant responded, while holding the knife, that if she did not go with him he was going to stab her. Asia agreed to go to the car but told defendant they could not leave because her break was ending and she needed to go back to work.

While walking out of the restaurant, defendant held Asia by her right arm and directed her to the parked car. He also put the knife in his pocket. After putting Asia in the front passenger seat, defendant got into the driver's seat and told Asia to put her seat belt on. Asia refused because she had to return to work, and defendant responded that he would kill her if she did not comply. Asia pretended to put her seat belt on, but never buckled it because she wanted to be able to escape quickly.

Defendant started the car and pulled out of the parking lot. While doing so, he pulled out a second knife from the driver-side door. When Asia asked defendant what he was doing, he yelled at her to shut up and to put her seat belt on or he was going to kill her. He then drove into a nearby neighborhood. When defendant was not paying attention, Asia attempted to take the knife away from him and it fell to the floor. Defendant then punched Asia on the left side of her face, making her light headed. Asia then opened the passenger side door in order to jump out of the car. She decided to jump because she thought defendant was going to kill her.

As Asia attempted to jump, defendant grabbed the back of her shirt and pulled her into the car causing the passenger door to swing and hit her in the face. She became unconscious. Asia fell from the car, landing in the gutter of a residential street. Several people in the neighborhood heard a car revving, tires screeching, and a woman scream. When a resident of the neighborhood approached Asia, her face was severely injured, requiring several surgeries and a hospital stay. While the resident called 911, defendant

drove up to their location. He got out of the car, picked up Asia, put her in the backseat, and quickly drove away. Defendant was heard saying “Why did you do this to me?” and “why did you jump out?”

When Asia awoke in the backseat of the car, her face hurt and was covered in blood. She told defendant to take her to the hospital, which he did.

II

Trial Proceedings

Asia’s testimony largely tracked the facts related above. However, she claimed defendant kicked and punched her during the June 21 incident after her cousin and sister pulled him off her while dragging her across the floor.² As to the October 29 incident, Asia claimed defendant tried to stab her twice while driving out of the La Bou parking lot while yelling at her to put on her seat belt.³ She also said she did not remember falling out of the car and only remembered the door hitting her in the face causing her to become unconscious.

During cross-examination of Asia, the defense questioned her extensively about statements she made regarding these incidents that were inconsistent with her testimony. As it related to the June 21 incident, Asia told a defense investigator that defendant had never been physically violent toward her, and she even wrote letters to the District Attorney explaining the incident had been a misunderstanding and requesting the charges against defendant be dropped.

During an interview with medical staff following the October 29 incident, Asia said she jumped out of the car during a heated argument with defendant and did not mention that defendant had attempted to stab her or had punched and kidnapped her.

² This testimony was not corroborated by either Asia’s cousin or sister.

³ The jury found the weapon allegation not true, implying the jurors did not believe this testimony.

During an interview with Elk Grove Police Officer Mark Bartley the day after the October 29 incident, Asia did not say defendant brandished a weapon in La Bou or that he ever threatened her or attempted to stab her with a knife during the incident. She said she went to the car with him because he had threatened to hurt customers. Asia also said she tried to get out of the car when the car was stopped but defendant drove away as she attempted to leave, causing her injuries. When speaking to the officer about other instances of domestic violence, she told him defendant had hit her with a fist on her leg, leaving a cut two weeks earlier. She recounted that in total defendant had hit her more than twice but less than 10 times over the course of their relationship.

During an interview two days after the October 29 incident with Elk Grove Police Detective Reggie Williams, Asia did not say that defendant had grabbed her arm while directing her to the parked car outside of La Bou. While she told the detective defendant tried to stab her twice, she did not tell him defendant punched her when questioned about her thought process for jumping out of the car. It was not until later in the interview that she told this to the detective. After recounting the June 21 purse incident, Asia mentioned that there had been no other similar incidents between her and defendant and failed to mention the October 15 car incident.

During an interview with a District Attorney investigator, Asia described the knife defendant used in the car on October 29 differently than she had during testimony. She also told the investigator that she asked her supervisor to take her lunch break when defendant walked into La Bou and never mentioned that he had brandished a knife and threatened customers if she did not leave the restaurant with him. She told the investigator that it was not until after she and defendant had left the restaurant that he brandished a knife and threatened to stab her if she did not go with him. When speaking with the investigator on a different occasion, Asia was inconsistent about when the October 15 car incident actually occurred. And throughout all of her interviews with the investigator, she never mentioned that defendant had abused her while she was pregnant.

The prosecution called Asia's cousin to testify. She said that when she was waiting outside of Asia's house to visit their grandmother, Asia yelled for her to come inside of the house because defendant was hitting her. When Asia's cousin went inside the house, Asia was crying and said defendant hit her with her purse and wanted money. Asia's cousin testified she did not actually see defendant hit Asia, but when confronted with her police statement, she testified that she did not remember if she had seen defendant hit Asia with the purse. Asia's cousin later testified that Asia told her defendant ripped her purse in half when the two were gathering up Asia's belongings to leave. The court overruled defendant's objection stating the jury could use the testimony to weigh Asia's credibility.

Asia's sister also testified on behalf of the prosecution. She said she heard defendant arguing with Asia about money and the reason for her leaving that day. She saw defendant take Asia's purse off her shoulder and tear it apart before rifling through the contents and hitting Asia in the face with the purse. Defendant then pulled Asia's hair and dragged her on the ground by her hair. She helped gather Asia's belonging and the group tried to leave but defendant took the keys from the car. They were able to leave because Asia found a spare car key.

Asia's mother testified that Asia told her defendant abused her before, while, and after she was pregnant. Additionally, she testified the two lived with her before L. was born and that she heard them fighting in their bedroom and things breaking. When she would intervene, defendant and Asia would be grabbing at each other and Asia's mother would have to break up the fight. When she intervened, the things she saw broken were always Asia's belongings, including Asia's phone. She saw bruises on Asia both before and after pregnancy.

The prosecution also called the Sacramento County Sheriff Deputy who took Asia's statement regarding the June 21 incident and questioned him about the particulars of Asia's statement, which corroborated her trial testimony. He also testified about statements Asia made to him regarding the June 15 incident when defendant punched her head, arms, and legs, leaving bruises. The court also admitted statements defendant's sister, Asia's cousin, and Asia's sister made to the deputy. In the case of defendant's 10-year-old sister, she did not testify. She told the deputy that all parties involved in the incident had left the home by the time the deputy got there and that the deputy could not go inside the home to look around, per her mother's request. She also told the deputy that defendant was the aggressor in the fight that had precipitated his presence. The deputy made arrangements to meet with Asia, her cousin, and her sister at another location. The deputy later met with defendant and observed two scratches on defendant's back and two dark spots on his forearms. The court admitted defendant's sister's statements over defendant's hearsay objections because it explained the deputy's subsequent actions.

Asia's cousin told the deputy that she did see defendant take the purse from Asia's shoulder, rip it in half, search its contents, and then hit her with its metal buckle. She also said that L. was in the bedroom when the fight occurred. After she took L. to the car, she returned and saw defendant drag Asia across the floor by her hair. She and Asia's sister grabbed each of defendant's arms to get him off Asia. Asia's cousin did not see defendant try to punch or kick Asia. Asia's sister told the deputy she saw defendant pull Asia's purse from her shoulder, rip it in half, and hit her with it. She also heard Asia ask defendant for her cell phone and witnessed the hair pulling incident. She stated she helped stop defendant from hurting Asia but said she did not see defendant try to punch Asia. The court admitted these statements over defendant's objection finding that Asia's cousin was not being deliberately evasive but that her lack of memory regarding whether

she had seen defendant hit Asia with the purse allowed for admission of her statements to the deputy.

The prosecutor also called Officer Bartley and Detective Williams, who laid the foundation for the audio recordings of their interviews with Asia, which were then played for the jury. Defendant objected to admission of these audio recordings under Evidence Code section 352. In both instances, defendant argued the recordings were unduly prejudicial because they contained sounds of medical equipment and were cumulative to Asia's testimony and her medical records. The trial court disagreed and admitted the recordings reasoning that Asia's credibility was a central issue of the case and the jury being able to hear her statements was relevant to its determination of her credibility. Further, Asia's physical condition after the October 29 incident was relevant to the jury's determination of whether she had sustained great bodily injury as was alleged by the prosecution. Finally, the recordings were short in duration, 16 minutes for the first and 13 minutes for the second.

The prosecutor also called a defense investigator and a District Attorney investigator to testify about their interviews with Asia. During both interviews, Asia made statements consistent with her trial testimony regarding the October 29 incident; and, as to the District Attorney investigator, she also told him defendant had hit her with the blade of a knife on her knee two weeks prior. The defense investigator was also permitted to testify to statements defendant's mother made to him. Specifically, she heard Asia tell her father while in the hospital that she jumped out of the car while in a verbal argument with defendant. The prosecution also called a social worker who spoke with Asia the day after the October 29 incident. Asia told her she jumped out of the car during a heated argument with defendant. She also testified that defendant's mother told her that she did not want to see Asia hurt anymore, which she took to mean physically hurt. Defendant's mother also told the social worker she told defendant not to see Asia at the hospital and to get counseling.

Following the jury's guilty verdicts as explained above, the trial court sentenced defendant consecutively to all felony charges, including the false imprisonment charge, for a total of 16 years and eight months. It sentenced him to a concurrent 16 days for each of the misdemeanor charges.

DISCUSSION

I

Defendant's False Imprisonment Conviction Must Be Vacated

Defendant contends, and the People agree, that his conviction for false imprisonment must be reversed because it is a lesser included crime of kidnapping and both convictions resulted from defendant's October 29 act of driving Asia away from her job after she voluntarily went to his car for the purpose of speaking with him. We accept the People's concession and accordingly reverse defendant's conviction for false imprisonment.

The crime of felony false imprisonment is a lesser included offense of kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233.) If both the false imprisonment count and the kidnapping count are based on the same act or course of conduct, a defendant cannot be convicted of both offenses. (See *People v. Sanders* (2012) 55 Cal.4th 731, 736.) "The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct." (*People v. Milward* (2011) 52 Cal.4th 580, 589.)

Based on the prosecutor's closing argument, in which she argued Asia consented to going to the car on condition defendant did not drive away, and Asia's testimony to the same, the parties agree the kidnapping and false imprisonment charges were based on the same underlying act of defendant's driving out of the parking lot against Asia's wishes. We agree. Accordingly, defendant's conviction for false imprisonment must be reversed.

II

Sufficient Evidence

We review sufficiency of the evidence challenges for substantial evidence:

“ ‘ “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citation.] ‘[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citations.] ‘Evidence is sufficient to support a conviction only if it is substantial, that is, if it “ ‘reasonably inspires confidence’ ” [citation], and is “credible and of solid value.” ’ ” (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 103-104.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate “ ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The sufficiency of the evidence to support an enhancement is reviewed using the same standard applied to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

A

Sufficient Evidence Supports The Jury’s Finding Of Great Bodily Injury

Defendant contends sufficient evidence did not support the jury’s finding that he directly and personally caused Asia’s great bodily injury because the direct cause of the injury was Asia’s decision to jump out of the car. We disagree.

In *Cole*, our Supreme Court held that a great bodily injury finding under Penal Code section⁴ 12022.7 subdivision (a) applies only to an individual who “perform[s] the act that directly inflicts the injury” on the victim and not to persons who aid and abet the

⁴ Further section references are to the Penal Code unless otherwise indicated.

injury. (*People v. Cole* (1982) 31 Cal.3d 568, 571.) In that case, the defendant blocked the victim's escape route, pointed a rifle at him, and ordered a codefendant to kill him. In response, the codefendant struck the victim on the head with a rifle, causing a serious laceration. Our Supreme Court concluded this evidence did not support the great bodily injury finding, stating, "In our opinion, the meaning of the statutory language is clear: the enhancement applies only to a person who himself inflicts the injury." (*Id.* at pp. 571-572.)

In *Dominick*, the defendant and two codefendants were charged with, among other things, kidnapping a man and a woman, murdering the man, and raping and injuring the woman. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1183-1187.) At one point during the crime, the defendant grabbed the woman and pulled her head back so one of the codefendants could strike her with a pole. The victim broke away after being struck and fell down a nearby mountainside, seriously injuring her shoulder during the fall. (*Id.* at pp. 1184-1186.) The defendant argued this conduct could not be the basis of the jury's finding he personally inflicted great bodily injury because, under *Cole*, the enhancement did not apply to him since he was an aider and abettor and did not personally inflict injury on the woman. (*Id.* at p. 1210.) The court rejected this argument and held that defendant's acts of grabbing the victim and holding her head back directly caused her to fall, thus defendant was personally responsible for the injury the victim suffered from her fall down the mountainside. (*Id.* at pp. 1210-1211.)

Similarly here, defendant's act of hindering Asia's escape by grabbing her shirt directly caused her injuries. Because defendant grabbed her, she lost control over the circumstances of her escape and, as a result, the passenger door hit her in the face causing her to become unconscious. Asia then fell from the car, instead of being able to jump in a way that may have avoided injury of the type she sustained. While Asia testified she thought she would break a bone if she jumped from the car, she still would have been

able to jump in such a way that would have potentially protected her face from contacting the road. She thus could have avoided the extended hospital stay and multiple surgeries.

Relying on *Modiri* and *Rodriguez*, defendant argues his case is unlike *Dominick* because there is no evidence he initiated physical contact with Asia causing her injuries. (*People v. Modiri* (2006) 39 Cal.4th 481, 497 [the defendant's participation in a group beating sufficient to show he personally inflicted great bodily injury even though his blows could not be directly attributed to the injuries when the defendant personally applied force and the force was sufficient to produce grievous bodily harm]; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 346, 351 [the defendant did not personally inflict great bodily injury when he did not initiate a struggle or other physical contact with the victim, an officer, when the officer became unconscious when he hit his head while attempting to stop the defendant from escaping custody].) We disagree and believe defendant's case is like *Dominick*.

The trial court in *Dominick*, which the appellate court affirmed, found the defendant inflicted great bodily injury because his conduct caused the victim to fall. “ ‘The court feels that although it's not an aiding and abetting theory, he did grab her hair, pulled her back, at which time she was struck. It would appear to me that that is enough of a participation in the injury that occurred to her that he would be responsible in her subsequently falling down the hill.’ ” (*People v. Dominick, supra*, 182 Cal.App.3d at pp. 1210-121.) That same reasoning is true here. Defendant grabbed Asia's shirt and pulled her back, at which time she was struck by the car door causing her to fall unconscious, not jump, out of the car. That conduct was sufficient in *Dominick*, and it is sufficient here even though the strike was not at the hands of a codefendant and instead a consequence of the circumstances of Asia's kidnapping -- circumstances defendant created through his own conduct. Accordingly, sufficient evidence supports the jury's true finding that defendant personally and directly inflicted great bodily injury upon Asia.

B

Sufficient Evidence Supports Defendant's Conviction For Inflicting Unjustifiable Physical Pain Or Mental Suffering Upon L.

Defendant contends sufficient evidence did not support his conviction for misdemeanor infliction of unjustifiable physical pain or mental suffering upon L. because his actions on October 15 did not pose a risk to L. and there is no evidence L., who was slightly over a year old, was traumatized by the event. We disagree.

Consistent with the jury instruction, section 273a, subdivision (b), provides in relevant part that: “Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable . . . mental suffering, . . . is guilty of a misdemeanor.”⁵ The difference between felony child abuse, under section 273a, subdivision (a), and misdemeanor child abuse, under subdivision (b), is whether the acts or omissions involved circumstances or conditions likely to produce great bodily injury or death to the child. (*People v. Burton* (2006) 143 Cal.App.4th 447, 454, fn. 4.)

In *Burton*, the defendant was convicted of misdemeanor child endangerment toward his eight-year-old son when the defendant slashed the face of the child's mother several times while the child was nearby. (*People v. Burton, supra*, 143 Cal.App.4th at pp. 450-451.) Although the child did not see the attack and was not in physical danger, he was nearby during the attack and saw his mother's bloody face immediately afterwards. (*Id.* at p. 454.) The court in *Burton* concluded that substantial evidence supported the conviction of misdemeanor child endangerment. “A reasonable person would easily recognize that a child would endure unjustifiable mental suffering by being

⁵ Section 273a, subdivision (b) criminalizes other causes resulting from a defendant's conduct, such as permitting a child to be placed in a situation where his or her person may be endangered. The jury, however, was not instructed on this theory.

on the scene while his father slashed his mother's face several times, and then immediately seeing the horrible, bloody aftermath.” (*Id.* at p. 455.) The court summarized its holding thusly: “[W]e conclude that a parent may be convicted of misdemeanor child endangerment under section 273a, subdivision (b), by engaging in serious domestic violence against the other parent while aware that his or her child is at the scene.” (*Id.* at p. 450.)

Here, as in *Burton*, defendant inflicted serious violence on his child's mother while knowing the child was present, and thus a reasonable juror could conclude the child endured unjustifiable mental suffering due to defendant's conduct. As in *Burton*, in determining whether the child endured unjustifiable mental suffering, “[w]e must bear in mind that the attacker was not just anyone, but the [child's] father, and the victim was not just anyone, but the [child's] mother.” (*People v. Burton, supra*, 143 Cal.App.4th at p. 455.)

We acknowledge, as defendant points out, that this situation is somewhat different from *Burton* because L. was slightly older than a year old when the incident occurred and could not verbally describe his mental suffering, like the child in *Burton* could. (*People v. Burton, supra*, 143 Cal.App.4th at p. 455.) The record nevertheless contains ample evidence of unjustifiable mental suffering. For one thing, the situation here was just as traumatic for L. because defendant cut L.'s mother by swinging a knife at her during a two-hour yelling match, all of which occurred in front of L. Defendant demanded Asia cut her hair and threatened to kill both her and L. multiple times over the course of those two hours. Although L. may not have understood the words defendant yelled, a reasonable juror could conclude that L. understood the general tone of the fight. Asia was sitting next to L., she was crying, bleeding, and begging defendant to stop. Defendant refused and continued his abusive conduct despite L.'s constant cries. Indeed, L. could not be comforted despite defendant's demands to Asia to make him stop. L. cried so hard and for so long that he fell asleep from exhaustion.

Under the circumstances, we conclude the mental suffering inflicted on L. was at least as great as the mental suffering inflicted on the child in *Burton* due to the fact that defendant engaged in prolonged abusive behavior in front of L. and ignored L.'s obvious suffering until he was too exhausted to voice his suffering (crying) anymore. Accordingly, as in *Burton*, the evidence in this case was sufficient to support a finding of misdemeanor child endangerment.

III

The Trial Court Did Not Abuse Its Discretion By Admitting Asia's Prior Statements And The Admission Of Other Witnesses' Prior Statements Was Harmless

Defendant contends the trial court erred by admitting several of Asia's prior statements and the prior statements of other witnesses. In particular, he argues the court should have excluded Asia's prior statements related by multiple witnesses because those statements merely served to corroborate Asia's testimony, and as to the audio recordings of her police statements, they further violated Evidence Code section 352. He also attacks the admission of Asia's cousin's and sister's, along with defendant's sister's and mother's prior statements for failing to meet a hearsay exception. We conclude there was no prejudicial error.

We review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.) “ ‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ ” (*People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329.)

A

Asia's Prior Statements

Defendant contends the testimony relating Asia's prior consistent statements to Asia's cousin, the deputy who took Asia's statement regarding the June 21 incident,

Asia's mother, the social worker, the defense and prosecution investigators, and the two police interviews were all improperly admitted. He argues the court should only have admitted the prior statements meant to rehabilitate Asia's testimony which was impeached by the defense; instead, the court allowed admission of the entirety of Asia's prior statements which served simply to corroborate her testimony. He further argues admission of the recordings of Asia's police interviews violated Evidence Code section 352. We disagree.

“To be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or (2) when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive.” (*People v. Riccardi* (2012) 54 Cal.4th 758, 802, abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1216.)

After a witness's credibility has been attacked, prior statements made by that witness are admissible to rehabilitate the witness's testimony to the extent those prior statements are consistent with the witness's trial testimony. (Evid. Code, §§ 791 [prior statement “that is consistent with [the witness's] testimony at the hearing” is admissible under certain circumstances], 1236 [statement offered in compliance with section 791 is admissible as an exception the hearsay rule “if the statement is consistent with [the witness's] testimony”].)

In *Riccardi*, a witness testified about the defendant's behavior in the months before he killed his ex-girlfriend and her friend. (*People v. Riccardi, supra*, 54 Cal.4th at pp. 765-767, 769-770.) In cross-examining the witness, defense counsel attempted to impeach her with her audio-recorded interview with the police, conducted the day after the murders. Following cross-examination, the prosecutor moved to admit the entire

audiotape of the witness's interview, arguing it was admissible because the defense implied she fabricated her testimony. The trial court allowed the jury to hear the entire police interview. (*Id.* at pp. 798-799.)

Our Supreme Court, however, held “the trial court erred in admitting those portions of the audio-recorded interview that did more than rehabilitate [the witness’s] testimony.” (*People v. Riccardi, supra*, 54 Cal.4th at p. 803.) The court found defense counsel’s cross-examination of the witness suggested she fabricated her trial testimony because she failed to mention important facts in her police interview. “Specifically, defense counsel claimed, in cross-examining [the witness], that she had never told police that [the defendant’s ex-girlfriend] reported hearing a loud bang from her patio the night before her death Defense counsel also claimed [the witness] had never told police that defendant threatened [his ex-girlfriend] that he could hurt her if he wanted to.” (*Id.* at p. 803.) Thus, the witness’s prior consistent statements in her police interview were admissible to refute the defense’s suggestion of recent fabrication. (*Ibid.*)

But the witness’s recorded interview included other statements “that were not part of her trial testimony.” (*People v. Riccardi, supra*, 54 Cal.4th at p. 799.) For example, in her police interview but not in her trial testimony, the witness described the defendant as “ ‘psychotic’ and ‘berserk’ ” and “suggested defendant had ‘connections’ with ‘bad guys’ in the criminal ‘underworld.’ ” (*Ibid.*) The witness described an incident to the police that she did not mention at trial. As to other incidents that she did testify about, the witness provided additional details to the police that she did not mention at trial. (*Id.* at p. 800.) In her police interview, the witness also described stalking incidents involving the defendant that she had not personally observed, and she speculated that the defendant might have followed the victims and “might have seen something that enraged him enough to kill both of them.” (*Id.* at p. 801.) Our Supreme Court recognized the witness’s prior statements conveying her beliefs about the defendant’s criminal associations, her description of incidents she did not testify about at trial, and her

speculation about the killings were not admissible to rehabilitate her credibility. (*Id.* at pp. 804-805.) The court explained, “Although portions of [the witness’s] audio-recorded statements to the detective were properly admitted to refute defendant’s characterization of her testimony, this circumstance does not necessarily establish that the entire recording was admissible.” (*Id.* at p. 803.)

Here, defendant implied Asia fabricated, or at the very least exaggerated, her testimony regarding the incidents in question and the ongoing domestic violence present in her relationship with defendant. Defendant impeached Asia’s testimony of the June 21 incident by pointing to her letters to the District Attorney explaining the incident was a misunderstanding and that she wanted the charges against defendant dropped. He further impeached Asia’s testimony regarding the October 15 incident with her statements to Officer Bartley and Detective Williams in which she failed to mention the incident or failed to state defendant used a knife during the incident when questioned about prior acts of domestic violence. He further implied that Asia exaggerated the October 29 incident by pointing to her prior inconsistent statements regarding the details of the crime and to several phone calls she made to defendant the day before the incident and after she had purportedly broken up with him.

Given defendant’s charge that Asia’s entire testimony lacked credibility and was unreliable, the People urge us to follow *Brents*, which stands for the proposition that where a defendant argues a witness’s entire testimony is unreliable, the entirety of that witness’s prior consistent statements are admissible to rehabilitate that witness. (*People v. Brents* (2012) 53 Cal.4th 599, 616.) This is not a case like *Riccardi*, where the prior consistent statement contains statements not made at trial or incidents not previously related to the jury. Indeed, Asia’s prior statements pertained only to the events in question and covered topics elicited during her direct and cross-examination. Defendant does not allege, nor could we conclude, that testimony regarding Asia’s prior statements

added facts to Asia's testimony or character indictments of defendant as was the case in *Riccardi*.

Defendant relies on our opinion in *Gentry* for the argument that prior consistent statements may not be used “ ‘merely to show that one of the witnesses had asserted the same thing previously.’ This Court correctly observed: ‘ “If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible.” ’ [Citation.] That explains in a nutshell why the trial court here abused its discretion by permitting the prosecution to present multiple witnesses and recordings that created a cumulative echo chamber, which simply regurgitated Asia's testimony over and over and over again, making it seem to the jury as though her testimony was being corroborated.” (Citing *People v. Gentry* (1969) 270 Cal.App.2d 462, 473-474.) While we agree with the general proposition announced in *Gentry*, that is not what happened here.

Asia's prior consistent statements were not admitted to show only that she had said the same thing previously but to also rehabilitate her testimony after defendant impeached her with numerous statements she had made and implied that her testimony was exaggerated. Indeed, several of the consistent statements introduced by the prosecution were part of the same interviews from which defendant pulled Asia's inconsistent statements. Thus, the trial court's admission of Asia's prior consistent statements does not run afoul of the principle described in *Gentry*.

Nor did admission of the recordings of Asia's police interviews violate Evidence Code section 352. Evidence Code section 352 allows for the exclusion of evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

We have listened to the audio recordings of Asia's police interviews and we agree with the trial court. While defendant argues the recordings were irrelevant to the jury's

determination of whether he was guilty of the offense or directly caused her injuries, the jury needed to determine whether Asia's injuries constituted great bodily injury. While that may not have been seriously contested by defendant, the prosecution still had the burden to prove this element of the allegation. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 69 [116 L.Ed.2d 385, 396-397] ["[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense"].) The recordings' demonstration that Asia was unable to hold extended conversations and focus on questions asked of her regarding recent events was relevant to the jury's determination of whether her injuries were serious enough to meet the standard for great bodily injury.

While Officer Bartley and Detective Williams testified to Asia's condition and ability to answer their questions, this could not substitute for the jury's ability to hear Asia's answers. Defendant relied on statements she made to these officers when impeaching her and the officers testified Asia appeared coherent and lucid and did not express confusion. When listening to the recordings, however, Asia is obviously under much duress. Her statements are short, pained, and at times given in fragments. The trial court did not err by finding the recordings held great probative value concerning the jury's obligation to determine Asia's condition and credibility.

Nor did the court err in finding limited prejudicial effect. The recordings were relatively short. While medical equipment can at times be heard on the recordings, it is brief and faint, if detectable at all. Further, while defendant characterizes the recordings as video, there was no video of Asia's interviews. Both exhibits are labeled "Audio Recording" and when played reveal only audio. Nothing in the record suggests the jury saw Asia in the hospital outside the photographs admitted of her injuries. Because the recordings provided context to Asia's statements, we cannot say their admission was cumulative -- credibility was a key issue in this case. Further, because the jury saw pictures of Asia's injuries, hearing her voice following those injuries was not likely to

create bias to the extent the jury would feel compelled to find defendant guilty despite evidence to the contrary. Accordingly, the court did not abuse its discretion by admitting the recordings of Asia's police interviews.

B

Other Witness Statements

Defendant contends the trial court erred by admitting the prior statements of Asia's cousin and sister, as well as prior statements of defendant's sister and mother. We agree the court erred in admitting the prior statements of Asia's cousin and sister made to the deputy, but not the statements of defendant's sister and mother. The resulting error, however, was harmless.

The detective who interviewed Asia and her cousin and sister regarding the June 21 incident was permitted to relate statements made to him by both Asia's cousin and sister. Nothing in Asia's sister's statements, however, was inconsistent with her trial testimony and defendant did not impeach her credibility during cross-examination with prior inconsistent statements or through an implied charge that she was fabricating or exaggerating her testimony. Thus, her consistent statements to the deputy were inadmissible under Evidence Code sections 791 and 1236.

Statements Asia's cousin gave to the deputy were inconsistent with her trial testimony; however, before allowing for their admission the court found that Asia's cousin was not deliberately evasive when she claimed not to have remembered seeing defendant tear Asia's purse off her shoulder and in half, rifle through the contents, and hit Asia with the purse. Thus, while not consistent, these statements are not inconsistent for the purposes of Evidence Code sections 770 and 1235. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78 [" '[T]he testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event,' " the court need first find the witness is being deliberately evasive].) Similar to Asia's sister, the remainder of the deputy's testimony regarding Asia's cousin's statements revealed

she made statements that were consistent with her testimony. Again, because defendant did not impeach her with inconsistent statements or imply she fabricated or exaggerated her testimony, her consistent statements to the deputy were inadmissible under Evidence Code sections 791 and 1236.

Conversely, defendant's mother's statements to the social worker that she did not want to see Asia " 'hurt' " anymore, meaning physically in the context of the conversation, and that she had told her son not to see Asia at the hospital and to seek counseling were admissible because the statements impeached defendant's mother's testimony that she did not know of defendant's past acts of domestic violence toward Asia. Indeed, defendant's mother testified she told the social worker she did not want to see Asia " 'hurt' " anymore but meant emotionally. She also testified that Asia never told her of any physical abuse, and although she knew defendant and Asia fought, she did not know of any physical abuse. For the same reasons the defense investigator's testimony regarding defendant's mother stating she overheard Asia tell her (Asia's) father of the circumstances of the October 29 incident was admissible.

Also admissible was defendant's sister's testimony to the deputy who responded to the June 21 incident. Defendant contends the deputy's testimony regarding his sister's statements was inadmissible hearsay. The trial court admitted the statements to explain the deputy's subsequent acts of contacting Asia, her cousin, and sister at a separate location, and we see no abuse of discretion in that ruling. "A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute." (*People v. Armendariz* (1984) 37 Cal.3d 573, 585; see also *People v. Scalzi* (1981) 126 Cal.App.3d 901, 906-907 [evidence of officer's state of mind irrelevant and thus inadmissible when it does not tend to prove or disprove an issue in the case].)

Defendant implied Asia fabricated or exaggerated the June 21 incident and pointed to evidence he also sustained injuries from the altercation. Defendant's sister's statement was admissible to explain why the deputy did not immediately interview defendant and instead sought to interview Asia at a different location than where the incident occurred. It further explained why the deputy was not able to provide any evidence from inside the home to corroborate either Asia's or defendant's theory of the incident. Further, the court informed the jury the deputy's testimony regarding defendant's sister's statements was not to be considered for the truth and was only admitted to explain his subsequent actions. We assume the jury followed this instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Thus, admission of statements made by defendant's mother and sister was not error; however, admission of statements made by Asia's cousin and sister was. We conclude, however, that the error was harmless because it is not reasonably likely a more favorable outcome would have resulted had the statements been excluded. (See *People v. Duarte* (2000) 24 Cal.4th 603, 618-619 [the admission of hearsay in violation of state law does not warrant reversal unless it is reasonably probable the defendant would have obtained a more favorable result had the evidence not been admitted].) The testimony about those statements was brief and merely told the jury what it already knew -- that Asia's cousin and sister were in a position to see or hear defendant's physical abuse of her on June 21 and recalled it predominantly the same way Asia did. Accordingly, there was no prejudicial error.

DISPOSITION

Defendant's conviction for false imprisonment is reversed. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

/s/
Robie, Acting P. J.

We concur:

/s/
Duarte, J.

/s/
Renner, J.